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Supreme Court of the United States

OCTOBER TERM, 1951

No. 408

SAFEWAY STORES, INCORPORATED, *Petitioner*,

v.

MICHAEL V. DISALLE, Price Director, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

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PETITION.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Safeway Stores, Incorporated, respectfully petitions for a writ of certiorari to the United States Emergency Court of Appeals to review a decree of said court entered on October 9, 1951 (R. 53), dismissing a petition filed by petitioner in an action in the nature of mandamus requesting said court to issue an order to respondent commanding him forthwith to grant or deny certain applications for adjustment filed by petitioner pursuant to the provisions of Sec-

tion 402(d)(4) of the Defense Production Act of 1950, as amended, 65 Stat. ch. 275, Public Law 96, 82nd Congress, 50 USCA Appendix Section 2071 et seq., and to issue procedural regulations providing administrative machinery for the processing of applications for adjustment that might be filed in the future.

The order of the United States Emergency Court of Appeals (R. 53) is as yet unreported.

A.

STATEMENT OF MATTER INVOLVED.

Petitioner is a corporation organized and existing under the laws of the State of Maryland, with its principal office in Oakland, California. It operates 1,948 retail food stores in twenty-three states and the District of Columbia and is subject to the provisions of the Act under the terms of which respondent has promulgated numerous ceiling price regulations and amendments thereto fixing ceiling prices on items sold by petitioner in its various stores. Among said regulations is Ceiling Price Regulation 15, originally issued effective April 5, 1951, (32 ACFR, Chapter III, 16 FR 2735).

On July 31, 1951, Section 402(d) of the Defense Production Act of 1950 was amended, inter alia, by the inclusion of an additional paragraph, Section 402(d)(4), reading as follows:

> "(4) After the enactment of this paragraph no ceiling price on any material (other than an agricultural commodity) or on any service shall become effective which is below the lower of (A) the price prevailing just before the date of issuance of the regulation or order establishing such ceiling price, or (B) the price prevailing during the period January 25, 1951, to February 24, 1951, inclusive. Nothing in this paragraph shall prohibit the establishment or maintenance of a ceiling price with respect to any material (other than an agricultural commodity) or service which (1) is

based upon the highest price between January 1, 1950, and June 24, 1950, inclusive, if such ceiling price reflects adjustments for increases or decreases in costs occurring subsequent to the date on which such highest price was received and prior to July 26, 1951, or (2) is established under a regulation issued prior to the enactment of this paragraph. Upon application and a proper showing of his prices and costs by any person subject to a ceiling price, the President shall adjust such ceiling price in the manner prescribed in clause (1) of the preceding sentence. For the purposes of this paragraph the term 'costs' includes material, indirect and direct labor, factory, selling, advertising, office, and all other production, distribution, transportation and administration costs, except such as the President may determine to be unreasonable and excessive."

Pursuant to the provisions of the foregoing section of the law, petitioner on August 24, 1951, filed with respondent an application for adjustments of its retail ceiling prices on various items covered by Ceiling Price Regulation 15 in forty of its stores located in Seattle, Washington (R. 7). On September 7, 1951, petitioner filed an amendment to its application. On various dates between August 28, 1951, and September 13, 1951, petitioner filed with respondent twenty-one additional applications for adjustments in ceiling prices on grocery items in approximately 1,014 of its retail food stores located in the states of Arizona, Arkansas, California, Colorado, Idaho, Iowa, Kansas, Maryland, Missouri, Montana, Nebraska, New Jersey, New York, Oklahoma, Oregon, South Dakota, Texas, Utah, Virginia, Washington and Wyoming, and in the District of Columbia. Each of said applications was verified by an officer of petitioner and contained data from petitioner's business records in support of the adjustment requested.

Following the amendment of the Act, respondent, to whom the President had delegated the powers of administration, took no steps towards the administration of the new section other than to appear before Committees of the

Congress and to request its repeal on the ground that it was incapable of administration. No regulations were issued informing persons subject to the law of the method or manner by which they should proceed in order to obtain consideration of applications filed pursuant to the amended Section 402(d)(4).

On September 17, 1951, petitioner filed in the United States Emergency Court of Appeals an action in the nature of mandamus requesting that court to issue an order directed to respondent herein commanding him forthwith to grant or deny the applications for adjustments hereinbefore mentioned and to issue procedural regulations providing administrative machinery for the processing of applications for adjustment which might be filed in the future, or for such other relief as justice might require (R. 1).

On October 2, 1951, respondent herein filed objections to the petition of petitioner and asserted, inter alia, that the petition was not within the court's jurisdiction and that it failed to state a claim upon which relief could be granted (R. 26). Respondent contended that petitioner had failed to assert rights properly enforceable by a mandatory writ; that petitioner had asserted no rights protected by Section 104(e) (Section 402(d)(4) of the Act as amended); that respondent is under no duty whatsoever to issue procedural regulations providing for administrative machinery for the expeditious processing of similar applications for adjustment; and that the petition, even if Section 402(d)(4) were applicable, does not make out a case for mandatory action.

On the same day that respondent filed his objections in the court, but without informing the court, respondent addressed a letter to the attorney for petitioner denying its applications for adjustment, and in that letter stated:

> "The Section of the Act [402(d)(4)] referred to does not in this case provide a basis for the adjustment for which you have applied since that amendment does not apply to your client who is a seller at retail. For

the same reason, namely, the inapplicability of the statutory provision relied upon, the Office of Price Stabilization does not plan to issue regulations to provide for adjustment of retail prices on the basis you have suggested." (R. 50).

On October 6, 1951, petitioner filed with the court below its reply to respondent's objections to the petition. (R. 42).

On October 9, 1951, the court without extended opinion denied petitioner's petition on the ground that "it is without jurisdiction to grant the relief prayed for." (R. 53).

B.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 408(d) of the Defense Production Act of 1950, as amended.

C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fifth Amendment to the Federal Constitution:

Defense Production Act of 1950, 64 Stat. 798, Public Law 774, 81st Congress, 50 U.S.C.A. App. 2071 *et seq.* as amended by the Defense Production Act Amendments of 1951, 65 Stat. 275, Public Law 96, 82nd Congress, 50 U.S.C.A. App. 2071 *et seq.*; and more particularly Sections 402(d)(4), 407(a), 407(d), 408(a), 408(c), 408(d) and Section 704 of the Defense Production Act of 1950 as amended by the Defense Production Act Amendments of 1951.

D.

QUESTIONS PRESENTED.

1. Whether Section 402(d)(4) of the Act does apply to petitioner which is a seller at retail.

2. If it does, whether the Emergency Court of Appeals had jurisdiction to issue an order directed to the respondent requiring him to take the procedural steps essential to a prompt, fair and impartial administration of the Act, as amended by Section 402(d)(4).

E.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The Clear and Unambiguous Language of Section 402(d) (4) Makes That Section Applicable to "Any Person Subject to a Ceiling Price" Without Limitation and Respondent's Contention That Said Section Does Not Apply to a Seller at Retail Finds No Support in the Statute.

Section 402(d)(4) of the Act makes no distinction between a seller at retail and a seller at a pre-retail level. The section is clear and unambiguous and should have been so construed and administered by the respondent. Rather, in an attempt to avoid administering the section as applied for by the petitioner, respondent arbitrarily and capriciously informed petitioner the section did not provide a basis for adjustment since it does not apply to a seller at retail. In support of his position, he informed the court below the legislative history of the amendment incorporated into the Act as Section 402(d)(4) demontsrated that it was inapplicable to a seller at retail.

This contention is squarely in conflict with the holding of this Court that courts will not resort to legislative history to interpret the meaning of a statute unless the statute on its face contains an ambiguity requiring such resort. *Soon Hing* v. *Crowley*, 113 U.S. 703; *Bird* v. *United States*, 187 U.S. 118; *U. S.* v. *Powers*, 307 U.S. 214; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381. Also see *Schweg-*

mann v. *Calvert Distillers Corporation*, 341 U.S. 384, and Mr. Justice Jackson's concurring opinion therein.

Because the court below, in its consideration of this controversy, obviously gave weight to respondent's contention that the statute was inapplicable to petitioner because of the nature of petitioner's business, this Court should review its judgment.

2. By the Terms of Section 407(a) and Section 704 of the Act Respondent is Required to Make Such Rules, Regulations and Orders as are Necessary or Appropriate to Effectuate the Provisions of the Act. His Refusal to Make Such Rules and Regulations was Arbitrary and Capricious and the Court Below Should Have Taken Jurisdiction to Require Compliance Not Only with the Law But with the Requirements of the Fifth Amendment.

The mere fact that respondent does not like the particular provision of the Act here in controversy, or that he considers it difficult of administration, or that he does not want it to apply to those who sell at retail notwithstanding the clear and unambiguous terms of the section, did not warrant him in arbitrarily and capriciously refusing to administer it or to promulgate procedural regulations for the handling of applications for adjustment filed pursuant to Section 402(d)(4)[1].

---

[1] This Court can take notice of the following facts. Immediately after the amendment of the Act here in controversy became effective the President denounced it as terrible and unworkable and urged Congress to repeal it. Respondent appeared before the Committee on Banking and Currency of the United States Senate on August 30 to urge its repeal. Subsequently, on October 9 and October 10, he appeared before the Committee on Banking and Currency of the United States House of Representatives to urge its repeal or, in lieu of repeal, the enactment of S. 2170 which had previously passed the Senate amending Section 402(d)(4) so as to limit its applicability to the sales of manufacturers or processors of any materials or the charges for industrial services. This Court can also take official notice that by action of the Rules Committee of the House, S. 2170 after having been reported to the House on October 15, 1951, with an amendment was denied a rule for immediate consideration so that no action can be had on it prior to January 1952, if any can be had then.

Section 704 of the Act provides for the making of such rules, regulations and orders as are necessary and appropriate to carry out the provisions of the Act. Section 407(a) of the Act requires the promulgation of regulations providing for protest procedures. The amendment of the Act here in controversy has not been implemented by any procedural regulation setting forth the steps necessary to be taken to obtain consideration of applications for adjustment filed pursuant to the provisions of Section 402(d)(4). Furthermore, respondent has stated that he intends to issue no such regulations to facilitate the processing of applications filed by retailers of whom petitioner is one. Thus, by the simple expedient of ignoring the mandate of the statute, respondent has caused irreparable injury to petitioner and will continue to cause such irreparable injury until and unless he is required by order of court to administer the law in accordance with its plain intent and stated purpose. His refusal to make rules and regulations was arbitrary and capricious and his continued refusal to make such rules and regulations for the processing of such applications for adjustment is arbitrary and capricious, and the court below should have taken jurisdiction to require his compliance with the law and the requirements of the Fifth Amendment. For that reason this Court should review the judgment below.

3. The Emergency Court of Appeals Had Jurisdiction Over the Controversy. Therefore, This Court Should Review its Decision Dismissing Petitioner's Petition for Lack of Jurisdiction.

By the precise terms of the statute, Section 408(d), the court below, and this Court upon review of its judgments and orders, has exclusive jurisdiction to determine the validity of any regulation or order relating to price controls issued under the Act. In the circumstances of this case, no other court could entertain a petition or an appeal or exercise any jurisdiction whatsoever over respondent to re-

quire him properly to administer the law or to grant to this petitioner the equitable relief sought below. *Yakus* v. *U. S.*, 321 U.S. 414. In order to aid the court below in the exercise of its powers, the Act conferred upon it the powers of a district court (Section 408(c) of the Act). Those powers include authority to issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law. 28 U.S.C.A. Sec. 1651. Its authority extends to those cases which are within its jurisdiction although no appeal has been taken, because one of the chief functions of mandamus is to remove obstacles to appeal. *Roche* v. *Evaporated Milk Association*, 319 U.S. 21.

As the record herein shows, respondent has taken the flat position that the amendment in controversy does not apply to petitioner, that he will not entertain applications for adjustment filed by a retailer pursuant to the terms of the particular section of the statute involved, and, furthermore, that he will not issue any regulations for the processing of applications for adjustment filed by a retailer pursuant to the provisions of said Section 402(d)(4).

In this controversy the respondent has resorted to the claim of lack of jurisdiction in an effort to deny petitioner the right to have its applications for adjustment considered in the light of the statutory mandate. He contends that the Emergency Court of Appeals is without jurisdiction to require him to act on such applications or to require him to promulgate regulations for the processing of such regulations. The court below apparently agreed with him, notwithstanding the provisions of the statute and more particularly those of Section 408(d) which give to it and this Court upon review of its judgments and orders exclusive jurisdiction "to determine the validity of any regulation or order relating to price controls issued under this title, and of any provision of any such regulation or order."

If, as held by the court below, it is without jurisdiction to require respondent to issue regulations for the administration of the section here in controversy, then petitioner

and others similarly situated are placed in the position of being unable to seek equitable relief from the arbitrary and capricious action of the Director in any other court. *Yakus* v. *U. S., supra.* It is respectfully submitted that this Court should review the decision of the court below to determine this question.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court directed to the Emergency Court of Appeals to the end that this cause may be reviewed and determined by this Court; that the decree of said court be reversed by this Court, and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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MICHAEL V. DISALLE, Price Director, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURTS OF APPEALS.

I.

PRELIMINARY STATEMENT.

The decision below, the statement of the matter involved and the questions presented appear in the petition for writ of certiorari and in the interest of brevity are incorporated herein by reference.

II.

SUMMARY OF ARGUMENT.

Point 1. Where a statute is clear and unambiguous a court should not resort to legislative history to interpret its meaning. *Soon Hing* v. *Crowley*, 113 U. S. 703; *Bird* v. *United States*, 187 U.S. 118; *U. S.* v. *Powers*, 307 U.S. 214; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381. Also see *Schwegmann* v. *Calvert Distillers Corporation*, 341 U.S. 384, and Mr. Justice Jackson's concurring opinion therein.

Obviously in this case the court below gave weight to the contention of respondent that the legislative history of Section 402(d)(4) showed that while Congress spoke in clear and unambiguous terms it intended a meaning other than that it stated. The statute applies to any person subject to a ceiling price and without limitation. The court below erred when it did not so hold, and this Court should review its judgment.

Point 2. By the terms of Sections 407(a) and 704 of the Act, respondent is required to make such rules, regulations and orders as are necessary or appropriate to effectuate the provisions of the Act. His refusal to make such rules and regulations is arbitrary and capricious and serves to defeat the right of this petitioner to perfect an appeal in the manner prescribed by the statute. This arbitrary and capricious action violates petitioner's rights under the Fifth Amendment and the court below should have so held.

Point 3. The statute vests the court below and this Court upon review of its judgments and orders with exclusive jurisdiction to determine the validity of any regulation or order relating to price controls issued under the Act. In the circumstances of this case no other court could entertain a petition or an appeal or exercise any jurisdiction whatsoever over respondent to require him properly to administer the law. *Yakus* v. *U. S.*, 321 U.S. 414. The court below is vested with the powers of a district court, including the authority to issue all writs necessary or appropriate in aid of its jurisdiction. This authority extends to those cases within its jurisdiction, although no appeal has been taken because one of the chief functions of mandamus is to remove obstacles of an appeal such as have been created by respondent herein. *Roche* v. *Evaporated Milk Association*, 319 U.S. 21. Furthermore, the decision of the court below conflicts with its decision in *Safeway Stores, Inc.* v. *Brown*, 138 F. 2d 278, cert. denied 320 U.S. 797. For these reasons this Court should review the judgment below.

III.

ARGUMENT.

Point 1.

Section 402(d) (4) of the Act Applies to All Persons Subject to Price Ceilings. The Clear and Unambiguous Language of Section 402(d) (4) of the Act Makes That Section Applicable to "Any Person Subject to a Ceiling Price" Without Limitation. Respondent's Contention That Said Section Does Not Apply to a Seller at Retail Finds No Support in the Statute.

Respondent's contention below that Section 402(d)(4) of the Act does not apply to petitioner because petitioner is exclusively engaged in sales at retail cannot be supported by the statute. Section 402(d)(4) is applicable to "any person subject to a ceiling price" without limitation. Therefore, resort should not be had to legislative history in an effort to give to a statute a meaning other than that stated therein. *Soon Hing* v. *Crowley*, 113 U. S. 703; *Bird* v. *United States*, 187 U. S. 118; *U. S.* v. *Powers*, 307 U. S. 214; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381. Also see *Schwegmann* v. *Calvert Distillers Corporation*, 341 U. S. 384, and Mr. Justice Jackson's concurring opinion therein. Because the court below in its consideration obviously gave weight to respondent's contention that the statute was inapplicable to petitioner because of the nature of petitioner's business, this Court should review its judgment.

Point 2.

By the Terms of Sections 407(a) and 704 of the Act, Respondent is Required to Make Such Rules, Regulations and Orders as are Necessary or Appropriate to Effectuate the Provisions of the Act. His Refusal to Make Such Rules and Regulations was Arbitrary and Capricious and Served to Defeat the Right of This Petitioner to Perfect an Appeal in the Manner Prescribed by the Statute.

Dislike for a statute does not warrant an administrative agent or agency in ignoring the terms thereof. The record in this case shows that notwithstanding the terms of Section 402(d)(4) respondent has taken the position that it does not apply to petitioner. He has further stated that he intends to make no rules or regulations providing for the processing of applications such as those filed by petitioner. (R. 50).

By the terms of Sections 407(a) and 704 of the Act, respondent is required to make such rules, regulations and orders as are necessary or appropriate to effectuate the provisions of the Act. A reading of the statute demonstrates that in the absence of such rules and regulations providing for the processing of applications for adjustment a preliminary step requisite to the appellate procedure cannot be taken. To illustrate:

Section 407(a) provides for the filing of protests against regulations or orders relating to price controls and such protests must be filed "in accordance with regulations to be prescribed by the President", and each such protest must specifically set forth objections and be accompanied by affidavits or other written evidence in support of the objections.

Section 407(d) requires that a protest shall be granted or denied, or granted in part and the remainder denied within a reasonable time after it is filed.

Section 408(a) provides that any person who is aggrieved by the denial or partial denial of his protest may file a complaint with the Emergency Court of Appeals and that upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation or order in whole or in part, to dismiss the complaint, or to remand the proceeding.

The Emergency Court of Appeals, and this Court upon review of its judgments and orders, are by the terms of Section 408(d) vested with "exclusive jurisdiction to determine the validity of any regulation or order relating to price controls issued under this title, and of any provision of any such regulation or order."

This court should bear in mind the fact that the amendments to the Act became effective on August 1, and between that time and October 24 (the date of the preparation of this Petition and Brief) respondent had not issued any regulations for the processing of any applications filed pursuant to Section 402(d)(4). He hadn't even issued regulations for the processing of applications of applicants who he admits are entitled to the benefit of the statute. Thus, by his dilatory tactics and his disregard of the mandate of the law, respondent has made it impossible for those subject to the law to proceed thereunder. These facts were called to the attention of the court below when petitioner requested it to issue a mandatory order requiring respondent to issue rules and regulations for the processing of applications for adjustment. The decision of the court below that it was without jurisdiction deprives petitioner of its rights as provided in the Fifth Amendment to the Constitution of the United States and should be reviewed by this Court.

Point 3.

The Emergency Court of Appeals had Jurisdiction Over the Controversy. Therefore, This Court Should Review its Order Dismissing Petitioner's Petition for Lack of Jurisdiction.

In the circumstances of this case no court other than the Emergency Court of Appeals could in the first instance entertain a petition or an appeal, or exercise any jurisdiction whatsoever over respondent to require him properly to to administer the law. *Yakus* v. *U. S.*, 321 U. S. 414.

The Emergency Court of Appeals is vested with the powers of a district court with respect to the jurisdiction conferred upon it (Section 408(c) of the Act). These powers include the authority to issue all writs necessary or appropriate in aid of its jurisdiction.

As held by this Court, this authority extends to those cases within its jurisdiction where an appeal has not been taken because one of the chief functions of mandamus is to remove obstacles of an appeal such as have been created by respondent herein. *Roche* v. *Evaporated Milk Association*, 319 U. S. 21.

All that petitioner requested of the court below was that it issue an order directing respondent to act as the statute requires him to act. Petitioner did not ask that the respondent be required to include specific terms in his regulations, but solely that he be required to issue regulations in order that the terms of the statute might be complied with.

As was stated by the court below in *Safeway Stores, Inc.* v. *Brown*, 138 F. 2d 278:

> "Under such circumstances mandamus will lie where an inferior tribunal or agency refuses to act even though the Act required involves the exercise of judgment and discretion. * * * Of course, in such a case the decree of the court would merely require the administrator to exercise his discretionary power * * * with-

out any direction as to the manner in which his discretion should be exercised."

Therefore, because the decision of the court below conflicts with its own decision in *Safeway* v. *Brown,* and with the decision of this Court in *Roche* v. *Evaporated Milk Association, supra,* this Court should review the judgment below.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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